



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 23, 2011

Mr. John R. Craig
Craig, Ward & Maroc, LLC
11035 Broadway, Suite B
Crown Point, IN 46307

Re: Informal Inquiry 11-INF-36; Lake County Auditor

Dear Mr. Craig:

This is in response to your informal inquiry regarding the Lake County Auditor ("Auditor"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

Your inquiry alleges that the Auditor violated the APRA by failing to produce records to you within 24 hours of your June 9, 2011, request. Specifically, you requested copies of "any and all Lake County Bidder Registration forms completed by those persons or entities registering to bid for the May 25, 2011 Lake County Commissioners Property Tax Lien Sale" and "[a] list containing the same or similar information as provided on the Lake County Bidder Registration form completed by those persons or entities registering to bid for the May 25, 2011 Lake County Commissioners Tax Lien Sale as required to be kept by the Auditor's Office pursuant to Indiana Code Section 6-1.1-25-8." You state that the Auditor "refused to turn over said documents within the statutory timeframe required of 24 hours or provide explanation as required."

In response to your inquiry, the Auditor's attorney, James L. Wieser, states that the Auditor did, in fact, respond to your complaint on the same day that you submitted it. At that time, the Auditor informed you that your request was granted, but that the records would take some time to compile. Mr. Wieser notes that the Auditor has suffered a reduction of almost thirty percent of its workforce since 2007, which has impacted the delivery of services and prevented the Auditor from responding to, among other things, public records requests as timely as in the past. The response included a letter from Gina Scheidt of the Auditor's office dated June 21, 2011. In that letter, Ms. Scheidt states that the delay in producing the records was due to the fact that the "May 25th, 2011 sale has not been closed out yet, which means the [Lake County] Treasurer has not finalized calculating totals received on sold properties or the people that bid on them." She adds that bids were still being accepted at that time and would continue to be accepted through

June 30th. Ms. Scheidt further claims that the Auditor's staff is "working on entering sale information, property information, & bidder information into the system to create certificates for all sold properties. After the information is entered and certificates are printed they will then go to the Lake County Commissioners, as well as, [sic] the Lake County Auditor and Treasurer to be signed. After signatures are received the certificates will then be sent out to each individual buyer." Finally, Ms. Scheidt states that a "bidder list is not something we use in this office so it is not automatically generated."

The APRA does require that if a request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. § 5-14-3-9(a). However, the public access counselor has consistently advised that a response from the public agency need not be a physical production of records; it could simply be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. *See, e.g., Op. of the Public Access Counselor 05-FC-135* (Counselor Davis, opining that "[t]he requirement that a response be issued within 24 hours does not mean that the records must be produced within that time."). Here, the Auditor maintains that you received a response when the Auditor informed you that your request would be granted. In my opinion, such a response satisfies subsection 9(a) of the APRA.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). Thus, under section 7, the Auditor should not permit employees to neglect their essential duties in order to respond to public records requests, but the Auditor cannot simply ignore requests either, even when facing the staffing and budgeting challenges described by Mr. Wieser.

To apply these standards to the present situation, the Auditor attributes the delay in producing the records you requested to the fact that they are not yet created because the sale is ongoing. Generally, the APRA does not require a public agency to create a new record to satisfy a public records request. *Opinion of the Public Access Counselor 10-FC-56* ("Where records are not yet created, a public agency does not violate the APRA by refusing to produce them."). If that is the case, the Auditor did not violate the APRA by failing to produce records that are not yet created. That said, my office consistently advises public agencies to release portions of public records requests as they become available rather than waiting to release all responsive records at the same time. Thus, I encourage the Auditor to release to you whatever portions of the requested records the Auditor has as they are created. Moreover, with respect to, for example, the

certificates for sold properties, the APRA does not differentiate between signed and unsigned documents, or “official” and “unofficial” versions of records. *See Op. of the Public Access Counselor 01-FC-56*. Thus, those are not bases upon which access to such records should be denied or delayed. I trust that the Auditor will make such records available as soon as practicable.

I note that in your reply to the Auditor’s response, you note that the Auditor routinely creates receipts for bids on the day of the tax sale. If this is true, the receipts should be available upon request, but I do not see in your original request where you sought access to such receipts. Requesting access to the receipts themselves is different than asking for a list that the Auditor does not maintain. In any event, I trust that the Auditor will produce the receipts within a reasonable amount of time upon receiving such a request.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: James L. Wieser